

UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA

FRANCINE SIMMONS, Individually, and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

NELNET SERVICING, LLC,

Defendant.

Case No. 4:22-cv-03194

CHRISTOPER CORDARO, Individually,
and on Behalf of All Others Similarly
Situated,

Plaintiff,

v.

NELNET SERVICING, LLC,

Defendant.

Case No. 4:22-cv-03207

PLAINTIFFS' MOTION TO APPOINT CO-LEAD INTERIM CLASS COUNSEL

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23(g) and this Court's Order (ECF No. 21), Plaintiffs Christopher Cordaro and Francine Simmons respectfully request that the Court appoint Matthew B. George of Kaplan Fox & Kilsheimer LLP ("Kaplan Fox") and Danielle L. Perry of Mason LLP as Interim Co-Lead Counsel for this consolidated litigation, or in the alternative, to a position on the Plaintiffs' Executive Committee. Mr. George and Kaplan Fox, and Ms. Perry and Mason LLP, have extensive experience litigating and resolving data privacy class action cases in courts throughout the nation, have obtained successful trial and appellate court rulings in this practice area, and have a demonstrated commitment to diversity and inclusion initiatives both in and out of court. Plaintiffs Cordaro and Simmons also support the consolidation of cases sought in *Spearman et al v. Nelnet Servicing LLC*, No. 4:22-cv-3191 (D. Neb.) and referenced in this Court's Order (ECF No. 21).

Numerous cases have been filed pertaining to the 2022 data breach experienced by Defendant. On September 8, 2022, Mason LLP filed a class action complaint on behalf of Plaintiff Simmons in this District. *See Simmons v. Nelnet Servicing, LLC*, No. 4:22-cv-03194-JMG-CRZ (D. Neb.). Plaintiff Simmons alleged that Nelnet Servicing LLC ("Nelnet" or "Defendant"), a student loan servicing company, failed to protect her and other similarly situated consumers' private information when Nelnet experienced a data breach sometime in June or July 2022. Then, on September 15, 2022, Kaplan Fox filed a class action complaint on behalf of Plaintiff Cordaro in this Court. *See Cordaro v. Nelnet Servicing, LLC*, No. 4:22-cv-03207 (D. Neb.). Plaintiff Cordaro similarly alleged that Nelnet failed to safeguard his private information when the breach occurred.

II. ARGUMENT

A. The Court Should Appoint Kaplan Fox and Mason LLP as Interim Co-Lead Class Counsel

In appointing interim class counsel under Federal Rule of Civil Procedure 23, the Court may consider the factors set forth in Rule 23(g)(1)(A) that include: “(i) the work counsel has done in identifying or investigating claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the type of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class[.]” Fed. R. Civ. P. 23(g)(1)(a). The Court may also consider any other matter pertinent to counsel’s ability to represent the class and “must” appoint the applicant best able to represent the class when there are multiple contenders. Fed. R. Civ. P. 23(g)(1)(B), (g)(2). As set forth below, Kaplan Fox and Mason LLP exceed all of these criteria, are best able to represent the class, and should be appointed as Interim Co-lead Class Counsel.

B. Kaplan Fox and Mason LLP Are Experienced in Successfully Litigating Complex Class Actions

Kaplan Fox and Mason LLP have an excellent track record of prosecuting complex class action litigation throughout the United States and can provide a vital combination of experience and subject matter expertise. Kaplan Fox maintains offices throughout the United States in New York City, Oakland, Los Angeles, Chicago, and New Jersey (which is potentially quite helpful insofar as there are plaintiffs and class members spread across the country). Mason LLP litigates cases in courts across the country and is headquartered in Washington, DC.

A few notable Kaplan Fox recoveries include: (1) *In re Bank of America Corp. Sec. Deriv., & ERISA Litig.*, No. 1:09-md-020508-PKC (S.D.N.Y.). As one of three co-lead counsel, Kaplan Fox recovered \$2.4 billion for investors just weeks before trial. The result is one of the largest recoveries in the history of securities class actions. (2) *In re Air Cargo Shipping Servs., Antitrust*

Litig., No. 06-md-1775 (JG) (VVP) (E.D.N.Y.). As one of four co-lead counsel representing direct purchasers alleging violations of antitrust laws, Kaplan Fox has recovered more than \$1.25 billion in settlements. (3) *In re Apple Inc. Device Performance Litig.*, No. 18-md-02827-EJD (N.D. Cal.). As co-lead counsel, Kaplan Fox recovered \$310 million for purchasers of iPhones who claimed their devices' performance was unlawfully degraded (pending final approval).

Mason LLP attorneys have been successfully prosecuting data privacy cases since the early 2000s resolution of the *In re Google Buzz Priv. Litig.*, No. C 10-00672 JW, 2011 WL 7460099 (N.D. Cal. June 2, 2011) (\$10 million settlement fund in case arising for unauthorized disclosure or personal information) (“*Google Buzz*”), and *In re Dep’t of Veterans Affs. (VA) Data Theft Litig.*, No. 1:06-MC-00506, 2007 WL 7621261 (D.D.C. Nov. 16, 2007) (unlawful disclosure of PPI of 28.5 million military veterans and active-duty personnel) (“*VA Data Theft*”). Most recently, Mason LLP served as court-appointed liaison counsel in *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 266 F. Supp. 3d 1 (D.D.C. 2017) (final approval of \$63 million settlement granted October 2022).

In obtaining these results, both Kaplan Fox and Mason LLP have demonstrated a commitment to fight through lengthy, protracted litigation against well-represented and resourceful defendants. Kaplan Fox and Mason LLP have displayed all the procedural and substantive lawyering skills necessary to achieve a successful result in this case—maneuvering through consolidation and coordination proceedings, overseeing and executing e-discovery and deposition strategies, fighting through contested class certification and summary judgment proceedings, and obtaining successful rulings on appeal. *See* Declarations of Matthew B. George and Danielle L. Perry, Exhibits 1 and 2.

C. Kaplan Fox and Mason LLP Are Experienced in Managing and Prosecuting Litigation Involving Information Privacy and Data Security

Kaplan Fox and Mason LLP also have substantial experience managing and prosecuting cases involving information privacy and data security pertinent to this matter. Kaplan Fox and Mr. George have successfully litigated some of the earliest large scale data breach cases against companies including Target and Home Depot. In *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522 (PAM) (D. Minn.), Mr. George was co-chair of the third-party discovery committee that subpoenaed Target's cybersecurity vendors and in which he deposed key Target personnel. In *In re The Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 14-md-2583 (N.D. Ga.), Kaplan Fox was on the steering committee that secured a recovery of \$25 million on behalf of financial institutions impacted by the breach.

Currently, Kaplan Fox is co-lead counsel in coordinated litigation against insurer Health Net, in which they filed for preliminary approval of a \$10 million cash settlement. *Harbour v. Health Net of California, Inc.*, No. 5:21-cv-03322-ED (N.D. Cal.), ECF No. 48. Kaplan Fox is also liaison counsel in consolidated litigation arising from a pandemic-related Deloitte data breach that obtained final approval of a \$5 million settlement in *Culbertson v. Deloitte Consulting LLP*, No. 1:20-cv-03962-LJL (S.D.N.Y.), ECF No. 151, and is appointed to the steering committee in *In re Am. Med. Collection Agency, Inc., Customer Data Sec. Breach Litig.*, No. 19-md-2904 (D.N.J.). Mr. George was also appointed to serve on the steering committee in *In re 21st Century Oncology Customer Data Sec. Breach Litig.*, No. 8:16-md-02737-MSS-AEP (M.D. Fla.), a multidistrict litigation over a nationwide cancer center's mishandling of medical data that resulted in a \$12.5 million settlement. Kaplan Fox was recently appointed co-lead interim counsel in *In re Illuminate Educ. Data Sec. Incident Litig.*, No. 8:22-cv-01164-JVS-ADS (C.D. Cal.), a data breach case alleging the mishandling of student records, personal, and private information.

While the *Google Buzz* and *VA Data Theft* litigations demonstrate Mason LLP's early pioneering of data breach litigation, in the last three years alone, Mason LLP attorneys have successfully litigated and obtained final approval of class action settlements in over two dozen data breach cases across the country including: *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 266 F. Supp. 3d 1 (D.D.C. 2017) (court-appointed liaison counsel; \$63 million settlement; final approval granted Oct. 2022); *In re Ambry Genetics Data Breach Litig.*, No. 8:20-cv-00791 (C.D. Cal.) (court-appointed member of Executive Committee; \$12 million settlement); *Baksh v. Ivy Rehab Network, Inc.*, No. 7:20-cv-01845-CS (S.D.N.Y.) (final approval granted Feb. 2021); *Kenney v. Centerstone of Am., Inc.*, No. 3:20-cv-01007 (M.D. Tenn.) (final approval granted Aug. 2021); *Klemm v. Maryland Health Enters. Inc.*, No. C-03-CV-20-022899 (Md. Cir. Ct. Balto. Cnty.) (final approval granted Nov. 2021); *North v. Hunt Mem'l Hosp. Dist.*, No. 89642 (Tex. 196th Jud. Dist. Ct. Hunt Cnty.) (final approval granted Dec. 2021); *Cece v. St. Mary's Health Care Sys., Inc.*, No. SU20CV0500 (Ga. Super. Ct. Athens-Clarke Cnty.) (final approval granted Apr. 2022); *Mowery v. Saint Francis Healthcare Sys.*, No. 1:20-cv-00013-SRC (E.D. Mo.) (final approval granted Dec. 2020); *Bailey v. Grays Harbor Cnty. Pub. Hosp. Dist.*, No. 20-2-00217-14 (Wash. Super. Ct. Grays Harbor Cnty.) (final approval granted Sept. 2020). *See* Exhibit 2.

In litigating these cases, Kaplan Fox and Mason LLP have developed a broad knowledge of the data security laws implicated in this case. Among other things, Kaplan Fox and Mason LLP and their attorneys have directed the litigation, class certification, and settlement strategies, researched and briefed the application of consumer protection and data privacy laws, implemented discovery strategy of defendants and third-parties, taken depositions of corporate information technology personnel and privacy compliance officers, responded to defendants' discovery, defended named plaintiffs' depositions, and worked closely with engineers and cybersecurity

experts to understand the technology issues implicated. All this experience will directly benefit the putative class.

D. Kaplan Fox and Mason LLP Are Well Suited For Co-Lead Counsel

1. Kaplan Fox Has a Demonstrated Track Record of Success in Class Actions and Support for Diversity and Inclusion Initiatives

Kaplan Fox's team in this matter will be headed by Mr. George, who is based out of the firm's Oakland, California office. He has been representing consumers, employees, and investors in complex class actions and multi-district litigation for 15 years. He is currently appointed as co-lead interim class counsel in *In re Robinhood Outage Litig.*, No. 3:20-cv-01626-JD (N.D. Cal.), representing investors on claims that their brokerage failed to prevent damaging outages across its online securities trading platform. In its Order appointing Mr. George, the Court noted that the leadership "significantly broadened in multiple ways the diversity of the attorneys designated for the interim roles." *Id.*, ECF No. 65 at 1:15-17. Mr. George also played a key role in *In re Apple Inc. Device Performance Litig.*, and assisted obtaining class certification in *In re Arizona Theranos Inc. Litig.*, No. 2:16-cv-02138-HRH (D. Ariz. Mar. 5, 2020).

Mr. George is also a member of the LGBTQ+ community, and has advanced initiatives for underrepresented communities both in and out of court. He represented classes comprised mostly of low-income, gay men living with HIV and AIDS in cases against CVS/Caremark and Aetna that recovered over \$20 million on claims the companies wrongfully exposed their HIV status. *Doe One v. CVS Health Corp.*, No. 2:18-cv-00238-EAS-CMV (S.D. Ohio); *Beckett v. Aetna, Inc.*, No. 2:17-cv-03864-JS (E.D. Pa.). In those cases, the class members received base payments of \$500 *without* having to file a claim (with many recovering significantly more). Mr. George has been a longstanding member of BALIF, the San Francisco Bay Area's (and nation's oldest) LGBTQ+ bar association, where he has volunteered in BALIF's formal mentorship program and worked closely

with law students and young attorneys to polish their resumes and advance their careers. He has also been a member of the Consumer Attorneys of California's ("CAOC") Diversity Committee, and he gave a presentation on the issue of implicit bias in the legal profession at CAOC's annual convention in November 2021.

Kaplan Fox's team will also be supported by the following experienced attorneys, and others, as necessary:

Laurence D. King is currently appointed as co-lead counsel to manage *In re Apple Inc. Device Performance Litigation*. In his Order appointing Mr. King, Judge Davila noted that plaintiffs' leadership "demonstrated an ability to cooperate with a range of different interests that span across law firms, practice groups, geography, and gender and introduce[d] smaller firms into the litigation experience." *Id.*, ECF No. 99. As part of that litigation, Mr. King successfully obtained a settlement of \$310 million. *Id.*, ECF No. 415. Mr. King also has considerable experience in the area of data breach cases, including appointment to leadership positions in the *Illuminate* and *American Medical Collection Agency* matters described above.

Blair E. Reed is a junior associate in Kaplan Fox's Bay Area office and she has significant experience with consumer class actions, including those involving data privacy such as *Huynh v. Quora*, No. 5:18-cv-07597 (N.D. Cal. 2018), which included allegations that Quora was negligent when it disclosed users' personal information to unauthorized third parties.

2. Mason LLP has a Strong Record of Inclusion and Demonstrated History of Success in Complex Class Actions.

Mason LLP's team in this matter will be led by Ms. Perry. Ms. Perry, a partner of Mason LLP, offers nearly a decade of class action litigation experience to the benefit of her clients, and has spent the last few years specializing in data breach class actions. Ms. Perry has herself or as a member of her firm been appointed lead counsel on numerous occasions. She is currently

appointed to the Leadership Development Committee in *In re SoClean, Inc. Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 2:22-mc-00152-JFC, MDL No. 3021 (W.D. Pa.), ECF No. 51 (“*SoClean, Inc. Litigation*”), where she works closely with Lead Counsel in all areas of litigation and fights for consumers rights pertaining to the purchase of defective and/or unsafe products. Ms. Perry has also played significant roles in numerous other MDLs. *See, e.g., In re DevaCurl Hair Prods. Litig.*, No. 1:20-cv-01234-GHW (S.D.N.Y.) (final approval granted Jan. 3, 2022) (Mason LLP served as court-appointed Co-Lead Counsel and Ms. Perry undertook substantial work for clients and class members with extensive hair loss, leading client interviews, drafting pleadings, and preparing settlement and settlement approval papers) (“*DevaCurl Litigation*”); *In re Hill’s Pet Nutrition, Inc. Dog Food Prods. Liab. Litig.*, No. 2:19-md-02887, MDL No. 2887 (D. Kan.) (final approval granted Oct. 2021) (Mason LLP served as court-appointed Co-Lead Counsel and Ms. Perry played a significant part in obtaining recovery for clients and class members who purchased dog food with sometimes lethal amounts of vitamin D, participating in client intake, discovery, and preparing settlement and settlement approval papers) (“*Hill’s Pet Litigation*”); *In re Marriott Int’l Customer Data Sec. Breach Litig.*, No. 19-md-2879 (D. Md.) (Ms. Perry contributed to plaintiff interview process and drafting of the consolidated amended complaint in data breach case). Ms. Perry herself has been appointed class counsel in numerous data breach cases which were brought to successful conclusion. *See e.g., Cece v. St. Mary’s Health Care Sys., Inc.*, No. SU20CV0500 (Ga. Super. Ct. Athens-Clarke Cnty.) (appointed class counsel in data breach case involving 55,652 people; final approval granted Apr. 2022); *Dekenipp v. Gastroenterology Consultants, P.A.*, No. 202161470 (Tex. 295th Jud. Dist. Ct. Harris Cnty.) (appointed class counsel in data breach case involving 163,000 people; final approval granted Oct. 2022).

Mason LLP’s team will be supported by the following experienced attorneys, and others,

as necessary:

Gary E. Mason has been prosecuting privacy cases for over 20 years, beginning as the first attorney in legal history to successfully settle a privacy case on a class-wide basis against Google. Mr. Mason was an early advocate for victims of security breaches and privacy violations, starting with the *Google Buzz* and *VA Data Theft* litigations, and continuing on more recently to his position as Liaison Counsel in *In re OPM Data Breach Litigation*. Mr. Mason holds and/or has held court appointed leadership positions in numerous MDLs. *See e.g., SoClean, Inc. Litigation* (appointed co-lead counsel; litigation pending); *DevaCurl Litigation* (appointed co-lead counsel; final approval granted Jan. 2022); *Hill's Pet Litigation* (appointed co-lead counsel; final approval granted Oct. 2021).

Lisa White is a Senior Attorney at Mason LLP. Ms. White is a writer and researcher at heart, with extensive litigation experience in product defect, product misrepresentation, data breach litigation, and wage and hour class actions.

E. Kaplan Fox and Mason LLP Will Commit Significant Time and Resources to Prosecute This Litigation Efficiently and Cooperatively

Kaplan Fox and Mason LLP have the personnel and financial resources required to litigate this case to a successful conclusion. The firm is well-qualified to present case management suggestions to the defendant and the Court, to work with plaintiffs' and defense counsel, to initiate and complete discovery, to examine deponents, to employ experts, to arrange for litigation support services (including document review platforms), and to ensure that all deadlines are timely met. Kaplan Fox and Mason LLP will also manage the litigation effectively and efficiently, avoid duplication of labor, assign tasks to attorneys and other firms commensurate with their experience and expertise, and employ a timekeeping and reporting protocol that they can make available to the Court for periodic review. Kaplan Fox and Mason LLP have a proven track record of working

collegially with many other plaintiffs' counsel in this case and will do so here.

III. CONCLUSION

Based on the foregoing, Plaintiffs Cordaro and Simmons respectfully request that the Court appoint Mr. George of Kaplan Fox and Ms. Perry of Mason LLP as Co-Lead Interim Class Counsel. In the alternative, Plaintiffs request that Mr. George and Ms. Perry be appointed to an executive committee or in any role the Court deems most appropriate for this litigation.

Dated: January 3, 2023

Respectfully submitted,

By: /s/ Danielle L. Perry

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2023, a copy of this motion was filed electronically with the United States District Court for the District of Nebraska and served on all counsel of record through the CM/ECF system.

/s/ Danielle L. Perry
Danielle L. Perry